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10/681,521	10/08/2003	Jason Harris	AP178HO	9633

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EXAMINER	
DENNISON, JERRY B	

ART UNIT	PAPER NUMBER
2143	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/681,521	Applicant(s) HARRIS ET AL.	
	Examiner J. Bret Dennison	Art Unit 2143	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 October 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-6,8-14 and 16-25* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-6,8-14 and 16-25* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

RESPONSE TO AMENDMENT

1. This Action is in response to the Amendment for Application Number 10/681,521 received on 10/08/2007.

2. Claims 1-6, 8-14, and 16-25 are presented for examination.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 6, and 9-16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

5. Claim 9 recites the limitation, "a tangible computer readable medium." The term "tangible" renders the scope of the claim unclear as far as what the claim encompasses by this term.

6. Claims 10-16 depend from claim 9 and are therefore rejected under the same rationale. Claims 10-16 also include the limitation, "The computer readable medium." When amending the claims to overcome this rejection, it is suggested by Examiner that the "computer readable medium" limitation in these claims also be amended to remain consistent with the "computer readable medium" of claim 9, as well as to avoid any possible antecedent basis issues.

7. Claim 6 includes the limitation, "setting the wait time to zero when the transfer rate is less than or equal to zero." It is unclear to Examiner how the transfer rate can be

less than zero, as such appears to indicate that there is a negative transfer rate. For examination purposes, Examiner will interpret the claim to read as the client not specifying a transfer rate.

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

8. Claims 9-16 rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

9. Claim 9 recites, "a tangible computer readable medium having program instructions for transferring a data file." Applicant's specification states,

"The invention can also be embodied as computer readable code on a computer readable medium. The computer readable medium is any data storage device that can store data which can be thereafter read by a computer system. The computer readable medium also includes an electromagnetic carrier wave in which the computer code is embodied. Examples of the computer readable medium include hard drives, network attached storage(NAS), read-only memory, random-access memory, CD-ROMs, CD-Rs, CD-RWs, magnetic 5 tapes, and other optical and non-optical data storage devices. The computer readable medium can also be distributed over a network coupled computer system so that the computer readable code is stored and executed in a distributed fashion." See Applicant's Specification, paragraph [0036].

Therefore, paragraph [0036] provides evidence that Applicant intends the computer readable medium to include carrier waves, and as such, the claim is drawn to a form of energy. Energy is not one of the four categories of invention and therefore this claim is not statutory. Energy is not a series of steps or acts and as such is not a process. Energy is not a physical article or object and as such is not a machine or manufacture. Energy is not a combination of substances and therefore not a composition of matter.

See ANNEX IV “Computer-Related Nonstatutory Subject Matter”, section (c) “Electro-Magnetic Signals” of the “Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility”, released 22 November 2005 in the Official Gazette (“Moreover, it does not appear that a claim reciting a signal encoded with functional descriptive material falls within any of the categories of patentable subject matter set forth in Sec. 101...These interim guidelines propose that such signal claims are ineligible for patent protection because they do not fall within any of the four statutory classes of Sec. 101.”).

Therefore, claims 9-16 are non-statutory.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10. Claims 1-6, 8-14, 16-23, 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marchetto et al. (U.S. 2003/0145100) in view of Mogul (U.S. 6,560,243).

11. Regarding claims 1, 9, 17-18 and 21, Marchetto disclosed a method for transferring a data file between a first and a second computing device, comprising:

calculating a wait time at the second computing device based on a transfer rate provided to the second computing device, wherein calculating includes dividing a data file portion size by the transfer rate prior to any transferring to the first computing device (Marchetto, [0059], Marchetto disclosed a source device calculating a wait time by dividing a packet by a desired target transfer rate; Clearly this is performed prior to transmission of any of the packets);

transferring a first portion of the data file from the second computing device to a first computing device (Marchetto, Fig. 1, computer 10 transmitting data file to computer 20);

waiting for the wait time at the second computing device before transferring a second portion of the data file to the first computing device (Marchetto, [0059]-[0060], Marchetto disclosed waiting for the wait time before sending a next packet to ensure the average bandwidth is equal to the target bandwidth)

Marchetto did not explicitly state wherein the transfer rate is provided by the first computing device and the second computing device adjusting the wait time during the transferring of the data file based on periodic updates of the transfer rate provided by the first computing device to the second computing device.

In an analogous art, Mogul disclosed transmitting a data file from a sender to a receiver in which the receiver system determines the target bandwidth to be allocated to the flow of data packets, and the sending system transmits the data at a rate approximating the target bandwidth (col. 1, lines 59-60col. 2, lines 5-6, 11-13). Mogul also disclosed that the receiver controls the transmission rate by being able to constrain the amount of data the receiver is willing to receive in a subsequent data transmission and can be done on a per-packet basis, thereby allowing the receiver to control the transfer rate in the middle of transmission of a file (Mogul, col. 4, lines 44-46).

The teachings of Marchetto and Mogul both provide mechanisms for transmission of a data file from a source to a destination at a desired target transfer rate. Marchetto disclosed the bandwidth allocation policy performed at the sending device by either configuration or by user input (Marchetto, [0068]). The teachings of Mogul recite that "Such approaches, however are inadequate when the system receiving the data flows wants to prioritize those data flows" (Mogul, col. 1, lines 29-30), and then continues on to provide the solution in which the receiving end has control of the bandwidth (as explained above). As such, it is clear that the teachings of Mogul benefit the invention of Marchetto by allowing the receiving end to specify the desired target bandwidth.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Marchetto and Mogul in order to allow the receiving end of Marchetto to specify the desired bandwidth thereby enabling the receiving end to prioritize its data flows, thereby enabling the receiving system to achieve its own bandwidth allocation policy among multiple sending sources sharing a communication link (Mogul, col. 1, lines 29-33, 52-56).

Claim 9 includes a computer readable medium with limitations that are substantially similar to claim 1, and is therefore rejected under the same rationale. Claims 17-18 and 21 include a system with a first and second computing device with circuitry and logic configured to perform the limitations of claim 1. As shown in Figure 1, Marchetto clearly disclosed a system of two computing devices, and therefore clearly including the circuitry and logic to perform the limitations of claim 1. As such, claims 17-18, and 21 is rejected under the same rationale.

12. Regarding claims 2, 10 and 19, Marchetto and Mogul disclosed the limitations as described in claims 1, 9 and 17, including:

determining a size associated with the first portion and the second portion (Marchetto, [0060]); comparing the size associated with the first portion and the second portion to the size of the data file; and if the size associated with the first portion and the second portion is less than a size of the data file, then the method includes waiting for the wait time prior to transferring a third portion of the data file to the first computing device (Marchetto, [0060], Marchetto disclosed transferring packets from the data flow at the rate; In order to do this, the server would have to know the sizes of each packet in the data flow, and would also have to know the size of the complete file. Otherwise, incorrect transmission of the files would occur; Marchetto clearly disclosed waiting the wait time between transmission of each packet).

13. Regarding claim 3, 11 and 20, Marchetto and Mogul disclosed the limitations as described in claims 2, 10, and 19. Marchetto and Mogul did not explicitly state wherein the method operation of determining the size associated with the first portion and the second portion includes, adding a first size associated with the first portion to a second size associated with the second portion.

However, it would have been obvious to one of ordinary skill at the time the invention was made that the source of Marchetto would have to know the sizes of each packet in the data flow, and would also have to know which packets have been transmitted, and therefore be able to know how much data has been transmitted in reference to the size of the data in order to determine when the complete file has been successfully sent, in order for the receiving system to successfully retrieve the complete file. See motivation above.

14. Regarding claims 4 and 12, Marchetto and Mogul disclosed the limitations as described in claims 1 and 9, including wherein adjusting the wait time includes recalculating the wait time at the second computing device based on an updated transfer rate (Mogul, col. 4, lines 44-55; Mogul disclosed the receiver providing an

acknowledgement that increases the advertised window, and the sender determining the bandwidth from the window). See motivation above.

15. Regarding claims 5, 13, and 22 Marchetto and Mogul disclosed the limitations as described in claims 1, 9, and 17. Marchetto and Mogul did not explicitly state including dividing the data file into unequal portions.

However, it would have been obvious to one of ordinary skill in the art at the time the invention was made that not all files can be divided into equal portions due to their original size in order to obtain the predictable result of actually sending the entire file to its destination. For instance, a 7 byte file divided into blocks of 5 bytes would result to one block of 5 bytes and one block of 2 bytes. The last 2 bytes must be sent in order to successfully send the entire file. Therefore it would have been obvious to one of ordinary skill in the art at the time the invention was made to divide the data file into unequal portions at least when it is not possible to divide the original file into equal portions based on its size, in order to provide the entire file at the requested bandwidth in a most efficient manner. See motivation above.

16. Regarding claims 6 and 14, Marchetto and Mogul disclosed the limitations as described in claims 1 and 9, including determining whether the transfer rate is greater than zero (Marchetto, [0059]-[0060], Marchetto disclosed determining the target rate which must include determining what the target rate is whether zero or greater than zero).

Marchetto and Mogul did not explicitly state setting the wait time to zero when the transfer rate is less than or equal to zero.

However, it would have been obvious for one of ordinary skill in the art at the time the invention was made for the server to transmit at its maximum rate when a transfer rate is not specified in order to obtain the predictable result of freeing the server's resources to serve other requests, as well as providing the data to the requesting device in the most speed efficient manner, as such does not require the server to perform any analysis.

17. Regarding claims 8, 16, and 25, Marchetto and Mogul disclosed the limitations as described in claims 1, 9 and 17, including: determining the transfer rate from transfer rate parameters selected from the group consisting of an amount of processor power availability of the client, an amount of network bandwidth availability, and an amount of memory availability of the client (Mogul, col. 2, lines 5-15, 20-26). See motivation above.

18. Regarding claim 23, Marchetto and Mogul disclosed the limitations, substantially as claimed, as described in claim 17. Mogul also disclosed that the client being a device including a CPU, user interface, and memory (Mogul, col. 3, lines 35-45).

Marchetto and Mogul did not provide the detail as to specific types of computers.

This would have motivated one of ordinary skill in the art to search the prior art for devices that can satisfy the requirements of the client device of Mogul.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use a laptop, PDA or cell phone as the client device since these devices all contain the hardware required in the described client device. See motivation above.

19. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Marchetto and Mogul as applied to claim 17 above, and further in view of Roy (U.S. 6,697,341).

20. Regarding claim 24, Marchetto and Mogul disclosed the limitations, substantially as claimed, as described in claim 17.

Mogul did not explicitly state wherein the system is a video conferencing system.

In an analogous art, Roy disclosed a multimedia conferencing service that provides services with selective performance parameters, delivering video signals to users based on hardware, software, and network limitations, as well as user preferences, including bandwidth (Roy, see Abstract).

Mogul provides a general system of allowing the receiving end to control the bandwidth. Roy provides such functionality implemented with a video conferencing system.

Therefore it would have been obvious for one of ordinary skill in the art at the time the invention was made to incorporate the video conferencing functionality of Roy into Mogul for the purpose of providing each user of the conference with the highest quality performance capability possible to that user's system (Roy, col. 1, lines 25-35)

Response to Amendment

Applicant's arguments and amendments filed on 10/08/2007 have been carefully considered but they are not deemed fully persuasive.

Applicant's arguments are deemed moot in view of the new grounds of rejection, necessitated by Applicant's substantial amendment (i.e., *by incorporating new limitations into the independent claims, which require further search and consideration*) to the claims which significantly affected the scope thereof.

Applicant asserts, "The time in between packets being sent out is related to the operating frequency of the server and the clock cycles and is not a wait time as discussed with regard to the present application. The wait time of the present application is in addition to what the Examiner refers to as the wait time. That is, when the server is sending out packets at a maximum rate, the wait time is zero under the present application. Accordingly, a wait time under the present application will be additive to what the Examiner refers to as wait time" [See Applicant's Response, the last line of page 8 through page 9].

From these statements, it appears that the Applicant's intentions are to have the server transmit a file portion at the server's maximum rate and then wait the calculated wait time before sending a next portion at the maximum rate. However, it is noted that the features upon which applicant intends (i.e., the wait time being additive) are **not**

recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Examiner notes that the claims simply recite sending a portion of a file, then waiting a time, then sending a portion of a file, and then waiting a time. There is nothing in the claims that differentiates from sending a file at a specific bandwidth.

The claims may be interpreted in a broader sense than what Applicant intends.

It is the Examiner's position that Applicant has not yet submitted claims drawn to limitations, which define the operation and apparatus of Applicant's disclosed invention in manner, which distinguishes over the prior art.

Failure for Applicant to significantly narrow definition/scope of the claims and supply arguments commensurate in scope with the claims implies the Applicant intends broad interpretation be given to the claims. The Examiner has interpreted the claims with scope parallel to the Applicant in the response and reiterates the need for the Applicant to more clearly and distinctly define the claimed invention.

Conclusion

Examiner's Note: Examiner has cited particular columns and line numbers in the references applied to the claims above for the convenience of the applicant. Although the specified citations are representative of the teachings of the art and are applied to specific limitations within the individual claim, other passages and figures may apply as well. It is respectfully requested from the applicant in preparing responses, to fully consider the references in entirety as potentially teaching all or part of the claimed invention, as well as the context of the passage as taught by the prior art or disclosed by the Examiner.

In the case of amending the claimed invention, Applicant is respectfully requested to indicate the portion(s) of the specification which dictate(s) the structure relied on for proper interpretation and also to verify and ascertain the metes and bounds of the claimed invention.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to J. Bret Dennison whose telephone number is (571) 272-3910. The examiner can normally be reached on M-F 8:30am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David A Wiley can be reached on (571) 272-3923. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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